



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 16

[EPA-HQ-OECA-2021-0552; FRL-8948-01-OMS]

Privacy Act Regulations for EPA-79

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA or Agency) is proposing to revise the Agency's Privacy Act regulations to exempt a new system of records, EPA-79, the National Enforcement Investigations Center (NEIC) Master Tracking System, from certain requirements of the Privacy Act because the records in EPA's NEIC Master Tracking System are maintained for use in civil and criminal actions. A notice has been published in the *Federal Register* on October 29, 2021 for the creation of this new system of records that will contain information collected by NEIC when supporting enforcement investigations. In the "Rules and Regulations" section of this Federal Register, EPA is simultaneously publishing the revision of the Agency's Privacy Act Regulations for EPA-79 as a direct final rule without a prior proposed rule. If the Agency receives no adverse comment, it will not take further action on this proposed rule.

DATES: Comments must be received on or before **[Insert Date 30 days from date of publication in the Federal Register]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OECA-2021-0552, at <https://www.regulations.gov/>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to

make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Michael Roach, Chief, Infrastructure and Project Support Branch, National Enforcement Investigations Center, Office of Criminal Enforcement, Forensics and Training, U.S. Environmental Protection Agency, Building 25--Box 25227, Denver Federal Center, Denver CO 80225; *Roach.Michael@epa.gov* (303) 462-9080.

SUPPLEMENTARY INFORMATION:

The EPA published a Privacy Act system of records notice for information collected using the NEIC Master Tracking System (86 FR 60033, October 29, 2021).

I. Why is EPA issuing this proposed rule?

The EPA proposes to revise the Agency's Privacy Act regulations in order to exempt a new system of records, EPA-79, the NEIC Master Tracking System, from certain requirements of the Privacy Act. The EPA has published a direct final rule exempting this system of records in the "Rules and Regulations" section of this Federal Register because it views this as a noncontroversial action and anticipates no adverse comment. EPA explains its reasons for the direct final rule in the preamble to that rule.

If EPA receives no adverse comment, it will not take further action on this proposed rule. If EPA receives adverse comment, it will withdraw the direct final rule and the rule will not take effect. EPA will address public comments in any subsequent final rule based on this proposed rule. EPA does not intend to institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information, please see the information provided in the **ADDRESSES** section of this document.

II. General Information

The EPA published a Privacy Act system of records notice for information collected using the NEIC Master Tracking System (66 FR 49947, Oct. 2, 2001; 84 FR 37866, Aug. 2, 2019). The system supports and documents investigations of persons or organizations alleged to have violated any Federal environmental statute or regulation or, pursuant to a cooperative agreement with a state, local, or tribal authority, an environmental statute or regulation of such authority. NEIC maintains information related to such investigative efforts, including the nature of work, investigation outcomes, required resources, and information about the supporting staff.

The EPA compiles and maintains the records in the NEIC Master Tracking System for use in criminal and civil investigations and actions. This system of records, EPA-79, is maintained by the Office of Enforcement and Compliance Assurance, Office of Criminal Enforcement, Forensics and Training, National Enforcement Investigations Center. This component of EPA performs as its principal function, activities pertaining to the enforcement of criminal laws.

Pursuant to the Privacy Act, when information is maintained for the purpose of civil actions, the relevant provision of the Privacy Act is 5 U.S.C. 552a(d)(5) which states “nothing in this [Act] shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.” 5 U.S.C. 552a(d)(5).

In addition, section (j)(2) of the Privacy Act provides that the head of an agency may promulgate regulations to exempt a Privacy Act system of records from certain provisions of the Act if the system is maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or

parole authorities, and which consists of: (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision. 5 U.S.C. 552a(j)(2). Accordingly the EPA proposes to exempt such records in the NEIC Master Tracking System, EPA-79, from 5 U.S.C. 552a(c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(5), (e)(8) and (f)(2)-(f)(5) and (g) for the following reasons:

(1) From subsection (c)(3), because making available to a named individual an accounting of disclosures of records concerning him/her/them could reveal investigative interest on the part of EPA and/or the Department of Justice. This could allow record subjects to impede the investigation, e.g., destroy evidence, intimidate potential witnesses, or flee the area to avoid inquiries or apprehension by law enforcement personnel. Further, such a disclosure could reveal the identity of a confidential source and hamper the Agency's investigation.

(2) From subsection (c)(4), which concerns providing notice to others regarding corrections or disputed information in accordance with subsection (d) of the Privacy Act, because no access to these records is available under subsection (d) of the Act.

(3) From subsection (d), which requires an agency to permit an individual to access, contest or request amendment of records pertaining to him/her/them, because the records contained in this system relate to official Federal investigations. Individual access to these records could compromise ongoing investigations, reveal confidential informants and/or sensitive investigative techniques used in particular investigations, or constitute unwarranted invasions of the personal privacy of third parties who are

involved in a certain investigation.

(4) From subsections (e)(1) and (e)(5), which require an agency to collect/maintain only accurate and relevant information about an individual, because the accuracy or relevance of information obtained in the course of a law enforcement investigation is not always known when collected. Material that may seem unrelated, irrelevant, or incomplete when collected may take on added meaning or significance as the investigation progresses. Also, in the interest of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of criminal activity. Therefore, it would impede the investigative process if it were necessary to assure the relevance, accuracy, timeliness and completeness of all information obtained.

(5) From subsection (e)(2), which requires an agency to collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about the individual's rights, benefits, or privileges under Federal programs. Application of this provision could impair investigations and law enforcement by alerting the subject of the investigation to the existence of the investigation. Further, compliance with the requirements of this subsection during the course of an investigation could impede the information gathering process or cause the destruction of evidence, thus hampering the investigation.

(6) From subsection (e)(3), which requires an agency to inform those supplying information of its authority to collect the information, its plans for using or sharing that information, and the effects of not providing the requested information. The application of this provision could provide the subject of the investigation with substantial information about the nature of the investigation, which could interfere with the investigation. To comply with the requirements of this subsection during the course of an investigation could impede the information gathering process especially when undercover operations or confidential sources are used, thus hampering the investigation.

(7) From subsections (e)(4)(G) and (H), which require an agency to publish—in the Federal Register—procedures concerning access to records, because no access to these records is available under subsection (d) of the Privacy Act, for the reasons explained above in the discussion of subsection (d).

(8) From subsection (e)(8), which requires notice to an individual whenever a record on such individual is made available to others under compulsory legal process, because complying with this provision could prematurely reveal an ongoing criminal investigation to the subject of the investigation.

(9) From subsections (f)(2), (f)(3), (f)(4) and (f)(5), concerning agency rules for obtaining access to records under subsection d, because this system is exempt from the access and amendment provisions of subsection (d). Since EPA is claiming that this system of records is exempt from subsection (d) of the Act, concerning access to records, the requirements of subsections (f)(2) through (5) of the Act, concerning agency rules for obtaining access to such records, are inapplicable and are exempted to the extent that this system of records is exempted from subsection (d) of the Act.

(10) From subsection (g), which provides for civil remedies if an agency fails to comply with certain requirements of the Act applicable to a nonexempt system of records, because EPA is claiming that this system of records is exempt from subsections (c)(3) and (4); (d); (e)(1), (2), (3), (4)(G) and (H), (5), and (8); and (f)(2), through (5) of the Act. The provisions of subsection (g) of the Act are inapplicable to the extent that this system of records is exempted from those subsections of the Act.

The EPA also compiles and maintains the records in the NEIC Master Tracking System for use in civil investigations and actions. In those cases, the system again is maintained by the Office of Enforcement and Compliance Assurance, Office of Criminal Enforcement, Forensics and Training, National Enforcement Investigations Center. 5 U.S.C. 552a(k)(2) states that the head of an agency may promulgate

regulations to exempt the system from certain provisions of the Act if the system “is investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2)” of 5 U.S.C. 552a. Accordingly all such records in the NEIC Master Tracking System, EPA-79, are exempt from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H) and (f)(2) through (f)(5):

(1) From subsection (c)(3) because making available to named individual an accounting of disclosures of records concerning him/her/them could reveal investigative interest on the part of EPA and/or the Department of Justice. This could allow record subjects to impede the investigation, e.g., destroy evidence, intimidate potential witnesses, or flee the area to avoid inquiries or apprehension by law enforcement personnel. Further, such a disclosure could reveal the identity of a confidential source, and hamper the Agency’s investigation.

(2) From subsection (d), which requires an agency to permit an individual to access, contest or request amendment of records pertaining to him/her/them, because the records contained in this system relate to official Federal investigations. Individual access to these records could compromise ongoing investigations, reveal confidential informants and/or sensitive investigative techniques used in particular investigations, or constitute unwarranted invasions of the personal privacy of third parties who are involved in a certain investigation.

(3) From subsection (e)(1), which requires each agency to maintain only such information about an individual as is relevant and necessary to accomplish a purpose of the agency, because in the course of law enforcement investigations information may occasionally be obtained or introduced the accuracy of which is unclear or which is not strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of criminal activity. Moreover, it would impede any investigative process, whether civil or criminal, if it were necessary to assure the relevance, accuracy, timeliness and completeness of all information obtained.

(4) From subsections (e)(4) (G) and (H), which require an agency to publish—in the Federal Register—procedures concerning access to records, because no access to these records is available under subsection (d) of the Privacy Act, for the reasons explained above in the discussion of subsection (d).

(5) From subsection (f)(2), (f)(3), (f)(4) and (f)(5), concerning agency rules for obtaining access to records under subsection (d), because this system is exempt from the access and amendment provisions of subsection (d). Since EPA is proposing to determine that this system of records is exempt from subsection (d) of the Act, concerning access to records, the requirements of subsections (f)(2) through (5) of the Act, concerning agency rules for obtaining access to such records, are inapplicable and are exempted to the extent that this system of records is exempted from subsection (d) of the Act.

Finally, EPA is making conforming edits to the regulations to remove references to the prior EPA-46 OCEFT/NEIC Master Tracking System, which EPA-79 replaces.

III. Statutory and Executive Order Reviews

Additional information about these statutes and Executive orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action was submitted to the Office of Management and Budget (OMB) for review and reviewed without comment.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not expected to be an Executive Order 13771 regulatory action because this action is not a

“significant regulatory action” under the terms of Executive Order 12866.

C. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. This action contains no provisions constituting a collection of information under the PRA.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531-1538, and does not significantly or uniquely affect small governments.

F. Executive Order 13132 (Federalism)

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this action.

H. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994).

List of Subjects in 40 CFR Part 16

Environmental protection, Administrative practice and procedure, Confidential business information, Government employees, Privacy.

Lynnann Hitchens,

Principal Deputy Assistant Administrator.

For the reasons stated in the preamble, title 40, chapter I, part 16 of the Code of Federal Regulations is proposed to be amended as follows:

PART 16—IMPLEMENTATION OF PRIVACY ACT OF 1974

1. The authority citation for part 16 continues to read as follows:

Authority: 5 U.S.C. 301, 552a (as revised).

2. Amend § 16.11 by:

- a. Revising paragraph (a);
- b. Removing and reserving paragraph (c)(3);
- c. Adding paragraph (c)(5);
- d. Revising the heading and first two sentences of paragraph (d); and
- e. Revising the introductory text of paragraph (e).

The addition and revisions read as follows:

§ 16.11 General exemptions.

- (a) *Systems of records affected.* (1) EPA-17 OCEFT Criminal Investigative Index and Files.
- (2) EPA-40 Inspector General's Operation and Reporting (IGOR) System Investigative Files.
- (3) EPA-63 eDiscovery Enterprise Tool Suite.
- (4) EPA-79 NEIC Master Tracking System.

* * * * *

(c) * * *

(5) The Agency's system of records, EPA-79 system of records is maintained by the National Enforcement and Investigations Center, Office of Criminal Enforcement, Forensics and Training, a component of EPA which performs as its principal function activities pertaining to the enforcement of criminal laws. Authority for the criminal law enforcement activities comes from Reorganization Plan No. 3 of 1970 (5 U.S.C. app. 1), effective December 2, 1970; Powers of Environmental Protection Agency, 18 U.S.C. 3063; Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9603; Resource Conservation and Recovery Act, 42 U.S.C. 6928; Federal Water Pollution Control Act, 33 U.S.C. 1319,

1321; Toxic Substances Control Act, 15 U.S.C. 2614, 2615; Clean Air Act, 42 U.S.C. 7413; Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. 136j, 136*l*; Safe Drinking Water Act, 42 U.S.C. 300h-2, 300i-1; Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. 11045; and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. 1415.

(d) *Scope of exemption.* EPA systems of records 17, 40, 63, and 79 are exempted from the following provisions of the PA: 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (2), (3), (4)(G), and (H), (5), and (8); (f)(2) through (5); and (g). To the extent that the exemption for EPA systems of records 17, 40, 63 and 79 claimed under 5 U.S.C. 552a(j)(2) of the Act is held to be invalid, then an exemption under 5 U.S.C. 552a(k)(2) is claimed for these systems of records from (c)(3), (d), (e)(1), (e)(4)(G) and (H), and (f)(2) through (5). * * *

(e) *Reasons for exemption.* EPA systems of records 17, 40, 63, and 79 are exempted from the provisions of the PA in paragraph (d) of this section for the following reasons:

* * * * *

3. Amend § 16.12 by:

- a. Revising paragraph (a)(1);
- b. Revising the first sentence in paragraph (a)(4)(i);
- c. Revising paragraph (a)(4)(iii); and
- d. Revising the introductory text of paragraph (a)(5).

The revisions read as follows:

§ 16.12 Specific exemptions.

(a) * * *

- (1) *Systems of records affected.* (i) EPA-17 OCEFT Criminal Investigative Index and Files.
- (ii) EPA-21 External Compliance Program Discrimination Complaint Files.
- (iii) EPA-30 OIG Hotline Allegation System.
- (iv) EPA-40 Inspector General's Operation and Reporting (IGOR) System Investigative Files.
- (v) EPA-41 Inspector General's Operation and Reporting (IGOR) System Personnel Security Files.

(vi) EPA-63 eDiscovery Enterprise Tool Suite.

(vii) EPA-79 NEIC Master Tracking System.

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(4) * * *

(i) EPA systems of records 17, 30, 40, 41, 63, and 79 are exempted from the following provisions of the PA, subject to the limitations set forth in 5 U.S.C. 552a(k)(2): 5 U.S.C. 552a(c)(3); (d); (e)(1), (4)(G) and (4)(H); and (f)(2) through (5). * * *

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(iii) EPA-17 OCEFT Criminal Investigative Index and Files, EPA-40 Inspector General's Operation and Reporting (IGOR) System Investigative Files, and EPA-79 NEIC Master Tracking System are exempted under 5 U.S.C. 552a(j)(2), and these systems are exempted under 5 U.S.C. 552a(k)(2) only to the extent that the (j)(2) exemption is held to be invalid.

(5) *Reasons for exemption.* EPA systems of records 17, 21, 30, 40, 41, 63, and 79 are exempted from the provisions of the PA in paragraph (a)(4) of this section for the following reasons:

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